

BARNEY FRANK
4TH DISTRICT, MASSACHUSETTS

2252 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-2104
(202) 225-5931

29 CRAFTS STREET
SUITE 375
NEWTON, MA 02458
(617) 332-3920

558 PLEASANT STREET
ROOM 309
NEW BEDFORD, MA 02740
(508) 999-6462

THE JONES BUILDING
29 BROADWAY
SUITE 310
TAUNTON, MA 02780
(508) 822-4796

Congress of the United States
House of Representatives
Washington, DC

DECEMBER 5, 2007

TESTIMONY OF CONGRESSMAN BARNEY FRANK

SUBCOMMITTEE ON FISHERIES, WILDLIFE AND OCEANS

"REBUILDING OVERFISHED FISHERIES UNDER

THE MAGNUSON-STEVENSON FISHERY MANAGEMENT ACT"

Thank you, Chairwoman Bordallo, for giving me the opportunity to testify today.

As the Representative of New Bedford, Massachusetts, the most productive U.S. fishing port for the last 7 years, I do what I can to support a wide range of hard working people involved in the fishing industry. The general opinion expressed by almost all of them -- which I share -- is that we can promote healthy fisheries and healthy fishing communities at the same time, but that in some areas federal law makes it unnecessarily difficult to achieve both goals simultaneously. The current law relating to fishery rebuilding timeframes is a prime example.

While I want to focus primarily on that issue, I am also pleased to note that I recently received a letter from out-going NMFS Administrator Hogarth, in which he makes two particularly important points that are relevant to today's hearing. First he states that it is NMFS's interpretation that under the new law's Allowable Catch Limit provisions (ACL), it is not necessary to deduct "overages" from the following year's fishing allocations. And, while the Science and Statistical Committees will have a key role in setting the ACLs, he states that the Regional Fishery Management Councils will still retain the authority -- subject to NMFS approval -- of determining the best approach for ensuring that a given fishery stays within the ACL targets. I look forward to working with NMFS, including Dr. Hogarth's as yet unnamed successor, along with members of this subcommittee, in seeing that the relevant guidelines and regulations reflect these interpretations. I am attaching as part of my testimony, a copy of the letter from Dr. Hogarth, and the letter, signed by myself and our colleague Rep. John Tierney, to which Dr. Hogarth was responding.

The Magnuson-Stevens Act sets the basic rebuilding timeframe at 10 years, and includes several exceptions to this standard rebuilding period: when the biology of the relevant stock of fish; other environmental conditions; or an international agreement in which the U.S. participates dictate otherwise. This notion of a standard rebuilding timeline, with exceptions for circumstances that fall outside the norm, makes sense, but only if other exceptions beyond the 3 already in the law are also included. If rebuilding weakened stocks can be achieved in, for example, 13 years instead of 10, the positive impact on fish stocks will ultimately be the same. But, because the rebuilding targets will be reached on a more gradual glide path, with less severe

reductions in fishing, the negative economic burden on affected fishing communities will also be less severe. Magnuson-Stevens requires the economic conditions of fishing communities to be taken into account as fishery management plans are developed, but if rebuilding plans have unnecessarily strict timelines, this economic component of the law can be compromised.

Providing more flexibility can help keep jobs in fishing communities (for fishermen, but also for those who support the industry in other ways), while rebuilding takes place. Once rebuilding is complete, the experienced fishermen and the economic infrastructure needed to keep the industry healthy will still be there. Contrast that idea with a "tough love" approach of deep cuts in order to meet a shorter deadline which doesn't take into account the individual conditions in a fishery or fishing community. If this path is followed, more people are likely to leave the industry entirely, leaving a much smaller group with the financial resources to survive the restrictions and remain in business. In the New Bedford area, where many groundfish jobs have been lost in recent years, more restrictions on fishing may be imposed in the coming years, and without added flexibility in the rebuilding requirements, further economic harm to the area is likely.

This is why I have supported legislation in recent years to add some additional rebuilding flexibility exceptions to the current law. In the current 110th Congress, I am cosponsoring H.R. 4087, introduced by my colleague Rep. Walter Jones of North Carolina (who I am pleased to join today in testifying). The bill would allow rebuilding periods in excess of 10 years in the following additional circumstances: 1) when a rebuilding program cannot be effective only by limiting fishing activity; 2) in order to minimize the economic impact on fishing communities; 3) for one or more fish stocks in a multi-species fishery; or 4) when there has been a substantial change to a biomass rebuilding target after the rebuilding target has begun. Of particular importance, the bill also specifically requires that for exceptions 2 – 4, the number of years beyond the standard 10-year period would be limited, according to a formula taking into account the biology of the species. In addition, exceptions 2 and 3 could only be applied if there is evidence that the relevant fish stock is already on a positive rebuilding trajectory.

These exceptions fall outside the norm, as addressed by the standard 10-year rebuilding period, but they make sense. If a few extra years would impose a less harsh economic burden on affected communities while still achieving the relevant targets, that is a reasonable way of helping to preserve local economies. If it is impractical for all stocks in a given multi-species fishery (because of natural biological fluctuations, predation, etc.) to reach their targets at the same time, an extension of the timeline for a few of the fish would be rational. In New England, the multi-species nature of the groundfish fishery has created situations in which species that have not rebuilt as rapidly as expected – like yellowtail flounder – have prevented other, more fully rebuilt fish from being caught at higher levels. And, if higher targets would make rebuilding impossible without economically harsh restrictions on fishing, why not avoid the 10-year straitjacket and offer some added flexibility?

I first became involved in this aspect of fishery law in 2002 when federal scientists increased the biomass targets for rebuilding a number of New England groundfish stocks – some by more than double the original figure, perhaps to levels not previously seen – after a 10-year rebuilding plan had already commenced. At that time, it was evident to most observers that, in order to achieve the new targets within the same 10-year period, it would be necessary to reduce fishing levels to

a degree that would have seriously eroded the economic base of fishing ports along the New England coastline, including the Greater New Bedford area. To reach the new targets even within a full 10-year period would have involved great economic sacrifice for the fishing industry, but to do so in a shorter period, despite the fact that the targets set in the original rebuilding plan were apparently being met, would have required truly draconian cuts in fishing.

At that point, several of my colleagues and I urged the National Marine Fisheries Service to add more time to the existing rebuilding period. When we were told that the law did not allow an extension beyond 10 years for cases in which the biomass targets were increased after rebuilding had begun, we began efforts to change the law. In 2002 we reached preliminary agreement with several members of the Resources Committee to include language in the Magnuson-Stevens Reauthorization bill that was then pending to allow more time for rebuilding in cases of substantially increased biomass targets. This language included two important caveats: any extension would be limited to no more than twice the original rebuilding period, and rebuilding would have to be projected to continue and be completed by the end of the longer period.

Though the Magnuson-Stevens reauthorization bill did not advance to the House floor in that Congress, NMFS ultimately did agree to allow additional time for rebuilding in the New England groundfish fishery. This was accomplished by means of "re-starting" the rebuilding clock. While this approach is not explicitly authorized in the law, the agency evidently possessed the legal authority to take this step, as it was not questioned by the Secretary of Commerce or challenged in court. Perhaps a restarting of the clock following a significant biomass target increase would fall within the current law's exception relating to "the biology of the stock of fish." However, I believe this point should be made explicit in Magnuson-Stevens regulations or guidelines, especially in light of the fact that the recently enacted reauthorization bill specifically states that nothing in its rebuilding flexibility provisions relating only to summer flounder should be construed to "limit or otherwise alter the authority of the Secretary...concerning other species." In other words, if NMFS already possesses rebuilding flexibility authority in the case of biomass increases, that should be made clear in regulations. On the other hand, because this situation is not directly addressed in the statute, it would also make sense to clarify this authority legislatively, which Mr. Jones's bill would do.

I would note that the approach in the 2002 agreement mentioned above became the model for other rebuilding flexibility proposals in subsequent years. In the 109th Congress I introduced legislation (H.R. 4940) that called for three additional exceptions to the standard 10-year rebuilding period, and there were several exceptions included in a separate bill I cosponsored (H.R. 5018 -- legislation reported by the Resources Committee, that helped form the basis for the eventual Magnuson-Stevens reauthorization bill passed last December). All of the exceptions in H.R. 4940 were time-limited and required continued rebuilding. Although this was not true initially in H.R. 5018, an amendment to strike the rebuilding flexibility provisions from the bill was defeated by a narrow margin during the Resources Committee markup. In any case, as negotiations on Magnuson-Stevens continued late into 2006, there was general agreement among those participating in the discussions that it would be necessary to include limitations on additional rebuilding period exceptions in the final legislation. Ultimately, as the negotiations were completed in the "lame duck" session following the elections, additional rebuilding

flexibility language was removed from the bill, with the exception of the narrow provision applying only to summer flounder.

When the House passed the Magnuson reauthorization bill in December, I noted in my remarks on the House floor my objection to providing flexibility only for summer flounder, because I believed that it was wrong to single out one type of fish, when others also needed or would need rebuilding flexibility. Although we only passed the Magnuson reauthorization bill about a year ago, and most of the key regulations are not yet complete, I strongly believe we need to give serious consideration to modifying that bill's rebuilding flexibility language, and I urge the members of the subcommittee to move forward on this issue.

Again, Madam Chair, I appreciate having the chance to appear today before the subcommittee, and I look forward to continuing to discuss these important matters with you and your colleagues.

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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910
THE DIRECTOR

The Honorable Barney Frank
House of Representatives
Washington, D.C. 20515

Dear Representative Frank:

Thank you for your cosigned letter regarding new provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Act). NOAA's National Marine Fisheries Service (NMFS) is committed to implementing these new provisions. Specific to the issues you raised, NMFS is undertaking several activities.

Role of Science and Regional Fishery Management Councils in Setting Annual Catch Limits (ACLs)

Ending and preventing overfishing is one of the Agency's top priorities. NMFS is revising the National Standard 1 Guidelines to include guidance on the new requirements to establish annual catch limits (ACLs) and accountability measures. We plan to publish a proposed rule for public comment this winter for Council use in designing ACLs and accountability measures by the 2010 and 2011 implementation deadlines. We agree that the issues you mentioned are important to the implementation of ACLs and accountability measures, such as clarifying the role of science and the Councils, and considering social and economic impacts.

Section 302(h)(6) of the Act requires that a Council develop ACLs that do not exceed the fishing level recommendations of its scientific and statistical committee or the peer-review process established under Section 302(g)(1)(E). We agree that the design and implementation of ACLs and accountability measures will require the use of the best scientific data available, good data collection systems, and must meet all requirements of the Act and other applicable Federal laws. Additionally, while the Act now requires identification of a science-based limit above which ACLs may not be set, we think that the Councils' role, subject to NMFS approval, remains intact with regard to recommending the management measures to control fishing mortality in a fishery and allocating catch amounts.

Accountability Measures and Rebuilding

Section 303(a)(15) requires that fishery management plans, implementing regulations, or annual specifications, establish mechanisms for specifying ACLs at a level such that overfishing does not occur, "including measures to ensure accountability." We agree that the Act does not specifically require a deduction of overages as a strategy to meet this requirement. NMFS believes that accountability measures may be designed and implemented differently and in a manner that is most appropriate to meet the unique

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES



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characteristics of each fishery as long as the overall objective is met to end and prevent overfishing.

Sustainable fisheries are the foundation of socially and economically strong fishing communities. Management strategies that end and prevent overfishing and rebuild overfished fisheries are an essential component of sustainable management. The rebuilding extension in Section 120 of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act applied specifically to summer flounder. Under Section 304(e)(4) of the Act, and confirmed by several courts, rebuilding of an overfished fishery must occur in a time period that is "as short as possible", taking into account the status and biology of the stock, the needs of the fishing communities, recommendations of international organizations in which the United States participates, and the marine ecosystem. Rebuilding "shall not exceed 10 years, except in cases where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise".

Limited Access Privilege Programs (LAPPs)

Of the proposed LAPP programs in the Northeast, only Individual Fishing Quota (IFQ) programs proposed by the New England Fishery Management Council are required by Section 303A(c)(6)(D) to be approved by referendum before they are submitted to the Secretary for approval and implementation. Clause (vi) of that subparagraph expressly excludes sector allocations from the referendum requirement.

Per Section 303A(c)(6)(D)(ii), NMFS will soon be issuing "guidelines and procedures to determine procedures and voting eligibility requirements for the referenda and to conduct such referenda in a fair and equitable manner." I encourage you to review and comment on the proposed rule when it is published in the *Federal Register*.

We have received input from the public on issues to consider in development of LAPP guidelines, which are currently being drafted and will be proposed for comment in 2008. The relationship of the sector programs and LAPPs may be addressed in the guidelines pending further analysis of the issues, such as those raised in your letter.

Safety

While National Standard 10 requires that conservation and management measures promote the safety of human life at sea, added emphasis has been placed on safety considerations. Section 303(a)(9)(C) now requires fishery impact statements for plans or amendments to assess, specify, and analyze the likely effects of conservation and management measures on the safety of human life at sea and consider measures that will improve safety. This analysis may be required for management measures that include but are not limited to closed areas, effort controls, trip limits, limited access privilege programs, buybacks, observer requirements, safety training, and the need for specific communications and life-saving equipment. We are also reviewing the new provisions, including those regarding safety, to determine whether our regulations in Section 600 of the Code of Federal Regulations need to be revised. Changes in management in certain

Bering Sea and Aleutian Islands fisheries are already improving vessel and human safety, and NMFS would like to see similar progress in all of the nation's fisheries.

We encourage you to review and comment on these actions during the respective comment periods. Further information on Magnuson-Stevens Reauthorization Act implementation information is available at <http://www.nmfs.noaa.gov/msa2007/>.

If you have further questions, please contact Eric Webster, Director of NOAA's Office of Legislative Affairs, at (202) 482-4981.

Sincerely,

A handwritten signature in cursive script, appearing to read "W. T. Hogarth".

William T. Hogarth, Ph.D.
Assistant Administrator
for Fisheries

Congress of the United States
Washington, DC 20515

October 31, 2007

Dr. William Hogarth
Administrator
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Dr. Hogarth:

We are writing to emphasize several key points which are vital to address in the proposed regulations for implementation of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA). As you know, earlier this year, we submitted a lengthy comment letter (a copy of which is attached) offering our interpretations on a number of important aspects of the new law. Because the process of developing the proposed regulations has now reached a stage where decisions on some of these matters will likely be made in the near future, we thought it would be helpful to underline the most important issues. All of these points are discussed in greater detail in the earlier comment letter.

Role of Science in Fishery Management. The MSRA raises the profile of science in the management of our fisheries by, among other things, requiring the establishment of annual catch limits (ACL) and calling for accountability measures when ACLs are exceeded. With this greater reliance on science, which we support, comes a greater responsibility for high quality data and balanced analysis, and it is essential that the implementing regulations reflect this need. Specifically, it is vital that the Science and Statistical Committees (SSC) draw from the broadest possible range of scientific opinion and methodologies in calculating ACLs. In addition, the science that underlies the ACLs and the process by which the ACLs are developed should be peer reviewed and transparent. Finally, the MSRA makes it clear that economic and social considerations must be more fully integrated into fishery management decisions, and it is therefore crucial that these elements become ongoing components of the scientific work mandated by the new law.

Role of Regional Fishery Management Councils. While the SSCs will have a more prominent role in fishery management as a result of their responsibility for developing ACLs under the MSRA, it should be made clear in the implementing regulations that the Councils, subject to NMFS approval, retain the ultimate authority to determine how ACL targets will be met. There should be a sharp distinction between on the one hand the technical guidance that will be provided by the SSCs based on their assessment of the appropriate fishing levels for given stocks, and on the other hand the decisions of the Councils on how best to allocate the limited marine fishery resources within the overall ACL limits established by the SSCs. In other words, there will in most cases be a range of possible management measures which can be expected to keep a given fishery within the designated ACL targets, and the Councils should retain the key role in choosing the best option.

Accountability and Rebuilding Flexibility. The MSRA contemplates the possibility that accountability measures will be imposed when ACLs are exceeded, but the law does not require the deduction of "overages" in one year from a subsequent year's fishing allocation, and the regulations should make that clear. The legislative history is unambiguous on this point – the initial Senate legislation included an overage provision, but it was dropped in the final version of the legislation. Thus, given the fact that accountability measures are not *required* under the law even when there are overages, the regulations should explicitly empower Councils to respond in a variety of ways to overages. These responses could include spreading out the necessary correction over several years or – in cases where rebuilding more than compensates for any overages – not imposing any accountability measures if rebuilding is projected to continue at a satisfactory rate. Finally, the regulations should also include clear authorization for extension of rebuilding periods for reasons other than the three explicitly provided for in Section 304(e)(4)(A)(ii) of the Magnuson Act, including, for example, when biomass targets are significantly increased during a rebuilding period. The MSRA's Section 120 (which applies to summer flounder) states that nothing in the section should be construed to "limit or otherwise alter the authority of the Secretary... concerning other species." Because the Secretary evidently possesses the authority to extend the rebuilding period by means of "re-starting the clock", an action which was taken with regard to several New England groundfish stocks in 2003, the existing authority obviously includes the ability to do this, and the regulations should reflect that.

Limited Access Privilege Programs (LAPP). The LAPP provisions of the MSRA include language calling for criteria aimed at broadening the participation in the New England LAPP referendum process "in order to ensure that crew members who derive a significant percentage of their total income from the fishery under the proposed program are eligible to vote in the referendum." This language should be interpreted in an expansive manner in the regulations, so as to permit a large percentage of affected crew members to vote in referenda. In addition, while the MSRA exempts sectors from the two-thirds referendum requirements, this exemption should not be used as a pretext to circumvent the referendum requirements. Rather, the regulations should prescribe narrow criteria for sector designation so that other participants in the same fishery are not forced to comply with – or compete with – an allocation system that is effectively a LAPP or Individual Fishing Quota (IFQ) system, notwithstanding the fact that the system has not been subject to the law's two-thirds referendum requirements.

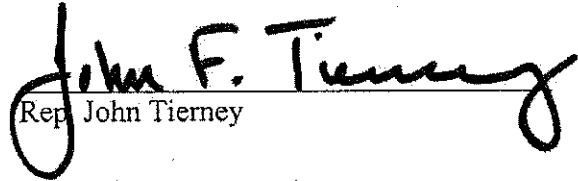
Safety. Section 104(a)(5) of the MSRA specifically requires safety to be taken into consideration as an integral part of fishery management measures. The purpose of this provision is to promote ongoing analysis of the safety implications of management proposals including such features as closed areas, days at sea, and trip limits, rather than addressing unintended safety implications of management regimes after the fact, when revisiting them may lead to harmful delays from both resource management and safety points of view. Fishing will remain a dangerous way to make a living regardless of any regulatory steps, but it is incumbent on the government, to the extent it can, to avoid increasing those dangers or putting in place management measures that could in any way compromise safety. The

regulations should require safety to be actively considered as each important fishery management decision is debated.

Thank you for your consideration of these points. We would appreciate anything you can do to see that the MSRA implementing regulations take these recommendations into account, and we would be pleased to discuss them further with you at your convenience.



Rep. Barney Frank



Rep. John Tierney

Attachment: April 17, 2007 comment letter from U.S. Reps. Frank and Tierney